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ALLOYSIUS TAN TING KAI

v.

NG HONG KHENG & ORS.

HIGH COURT BORNEO, KUCHING

GEORGE SEAH J

b

[CIVIL SUIT NO. K 13 OF 1973]

28 NOVEMBER 1981

***TORT:** Defamation - Claim for damages for libel - Whether defence of qualified privilege available - Whether publication actuated by malice.*

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The plaintiff claimed for damages for libel contained in a letter dated 6 January 1973 written and signed by the 3 defendants jointly, and addressed to the Protem President, SESCO Senior Officer's Association (SESCOSOA) and published to various other persons; an injunction restraining the defendants and each of them from writing or circulating or distributing or otherwise publishing of the plaintiff the said or any similar libel; but the claim for an injunction was withdrawn at the hearing as the plaintiff had since the filing of the writ resigned from his post as secretary of Sarawak Electricity Supply Corporation (Sesco).

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The plaintiff was appointed secretary on probation in 1968 and confirmed in 1970. Later his basic salary was increased and he was placed in Division 1 Scale A with effect from 1 January 1972.

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In January 1973, the plaintiff received a hand-delivered envelope addressed to him. It was sealed with a cello tape. In it the plaintiff found a cyclostyled letter directed to Protem President, SESCOSOA dated 6 January 1973, entitled "Case-histories of Grievances" and containing the signatures and names of the 3 defendants. (Ex.P3). The letter was copied to various other persons.

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The allegations in the 3 case-histories were that the plaintiff had deliberately misinformed and cheated the members of the board of Sesco that he had carried out a policy of victimisation against certain members of the staff of Sesco including the 1st and 3rd defendants and that he had deliberately changed the standing orders or misinterpreted them for his own personal gain and purpose and that thus he was unfit to retain the post of secretary or any office of trust within Sesco.

The defences of the defendants were as follow:

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(1) The 2nd and 3rd defendants denied that they wrote, published or signed the original of Ex. P3 (But before the hearing, the defendants admitted to signing Ex. P3 without reading it).

(2) The 3rd defendant in his amended defence pleaded that the copies that were despatched were confidential for the addressee.

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(3) All 3 defendants pleaded particulars of the privileged occasion, that they and the plaintiff were employees of Sesco, that the letter was sent only to persons who had a common interest with them in the matter, that the intention in the publication of the letter was not to defame the plaintiff but merely to obtain redress for grievances and in the reasonable protection of their own interests and interests of Sesco.

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(4) All 3 defendants relied on standing order 86, which provided for the employees to make representations to the members of the corporation through the general manager, and on standing orders 302 and 303.

(5) The 2nd and 3rd defendants pleaded that even if they were held to have published. Ex. P3, they did so unintentionally.

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(6) All the defendants relied on standing order 91, which read, “No steps shall be taken by any employee to institute legal proceedings in his own personal interest in connection with matters arising out of his employment without the previous consent of the members of the Corporation.”

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Held:

[1] He was satisfied on the balance of probabilities that the original of Ex. P3 was prepared by and signed by all 3 defendants. The onus was on the 2nd and 3rd defendants to establish that they had signed the original of Ex. P3 and they had failed to discharge the burden. The defendants had not pleaded *non est factum*. Generally, a person who signs a document is bound by its contents even though he had not read it or had not understood it at the time.

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[2] The words complained of in the statement of claim, in their ordinary and natural meanings, were libellous and defamatory of the plaintiff. It is enough if the words complained of render the plaintiff contemptible or ridiculous or tend to degrade or lower him in the estimation of men whose standard of opinion the Court can properly recognise, or to hinder mankind from associating or having intercourse with him (*Tolley v. Fry* [1930] 1 KB 479; *Byrne v. Deane* [1937] 1 KB 818; *Austin v. Culpepper* [1684] 4 Show.313; *Maclaren v. Robertson* [1859] 21 D. 183; *Griffin v. Divers* [1922] SC 605; *Brownlie v. Thomson* [1859] 21 M. 480; *M’Gregor v. Gregory* [1843] 11 M & W 287).

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[3] There was publication of libellous and defamatory matter of the plaintiff to PW2, the President of Sesco Employees Union, to PW3, the protem honorary secretary of the SESCOSA and to the general manager of Sesco.

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[4] By virtue of S.O. 86, the publication to the general manager of Sesco and to PW3 was made on a privileged occasion. The test of whether the occasion is privileged or not is whether the statement was “... fairly made a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. (Per Lord Dunedin in *Adam v. Ward* [1917] AC 309, quoting from *Toogood v. Spyryng* 1 CM AR 181).

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The publication to PW2, however, was not made on a privileged occasion. PW2, as president of the Sesco Employees Union, was not concerned with the affairs of the senior officers, who were not members of his union. Though the defendants might have an interest or duty in communicating Ex. P3 to PW2, he was not under a corresponding duty to receive it.

[5] The publication of Ex. P3 or a copy of it to the general manager and to PW3 was, however actuated by express malice and therefore, though the publication was on a privileged occasion the defence of privileged occasion failed.

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The same result would follow in PW2’s case if the learned Judge was wrong in holding that the publication to him was not on an occasion of qualified privilege (*Adam v. Ward*; *Horrocks v. Lowe*).

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The defence of the 2nd and 3rd defendants that the publication, if any, was unintentional was not valid. No positive step was taken by them to minimise the loss done to the plaintiff. It was quite clear from the tone of Ex. P3 that the dominant motive of the 3 defendants was to injure the plaintiff. None of the defendants had raised the defence of truth and that the letter was written in the public interest. The 3 defendants did not give evidence in rebuttal

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- a** and had refused to apologise for the libel. Ex. P3 also contained in addition to the case histories and grievances, a number of extraneous matters which were highly critical and defamatory of the plaintiff. A defendant who uses the occasion for some other reason loses the protection of the privilege. As Lord Dunedin pointed out in *Adam v. Ward* [1917] AC 309 at pp. 327-328 the proper rule as respects irrelevant defamatory matter incorporated in a statement made on privileged occasion is to treat it as one of the factors to be taken into consideration in dealing whether, in all the circumstances, an inference that the defendant was actuated by express malice can properly be drawn. As regards irrelevant matter the test is not whether it is logically relevant but whether, in all the circumstances, it can be inferred that the defendant either did not believe it to be true or, though believing it to be true, realised that it had nothing to do with the particular duty or interest on which the privilege was based, but nevertheless seized the opportunity to drag in irrelevant defamatory matter to vent his personal spite, or for some other improper motive. Here too, judges and juries should be slow to draw this inference (per Lord Diplock in *Horrocks v. Lowe* [1974] 2 WLR 282 at pp. 292-293).

b [6] Standing order 91 is an administrative procedure and failure to comply with it might result in disciplinary action being taken against the plaintiff by SESCO but would not affect the jurisdiction of the Court to hear the case.

c **d** The case of *Tharmalingam v. Sambanthan* [1961] MLJ 63 and *Datuk Pasamanickam & Anor. v. Agnes Joseph* [1980] 2 MLJ 92 were distinguishable from the case before the Court. In those cases the MIC constitution made it incumbent upon the appellants to pursue their appeal first before the Central Working Committee of the MIC. It was a condition precedent that an appellant should resort to the domestic remedies provided before resorting to the Court. On the other hand, S.O. 91 was not a condition precedent and the absence of consent of the members of the corporation did not vitiate the legal proceedings taken by the plaintiff in the case before the Court was not suing SESCO, his employers, but other employees of SESCO, and therefore he was not bound by the standing orders. None of the 3 defendants can invoke S.O. 91 in the action (*Scott v. Avery* 10 ER 1121 also mentioned).

e **f** [7] The plaintiff should be awarded the sum of RM12,500 as fair compensatory damages. As the purpose of bringing the action was for the plaintiff to clear his reputation and as he had not adduced any evidence to prove that he had suffered any financial loss following the publication of the libel, only compensatory damages were to be awarded to him and these would be limited to fair compensation to his injured feelings. (*Yap Bor Lim v. Chia Thye Poh & Anor.* [1965] 2 MLJ 123; *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor.* [1973] 2 MLJ 56; *Hasnul bin Abdul Hadi v. Bulat bin Mohamed & Anor.* [1978] 1 MLJ 75; *John Lee v. Henry Wong Jan Fook* (FC.CA No: 115/80 unreported).

- g** **h** **i** **Cases referred to:**
Tolley v. Fry [1930] 1 KB 479
Byrne v. Deane [1937] 1 KB 818
Austin v. Culpepper [1684] 4 Show 313
Maclaren v. Robertson [1859] 21 D 183
Griffin v. Divers [1922] SC 605
Brownlie v. Thomson [1859] 21 M 480
M'Gregor v. Gregory [1843] 11 M & W 287
Adam v. Ward [1917] AC 309
Horrocks v. Lowe [1974] 2 WLR 282
Tharmalingam v. Sambanthan [1961] MLJ 63
Datuk Pasamanickam & Anor. v. Agnes Joseph [1980] 2 MLJ 92

Yap Bor Lim v. Chia Thye Poh & Anor. [1965] 2 MLJ 123
Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor. [1973] 2 MLJ 56
Hasnul bin Abdul Hadi v. Bulat bin Mohamed & Anor. [1978] 1 MLJ 75

For the plaintiff - J.C. Fong
For the 1st defendant - B.G. Bong
For the 2nd defendant - James King
For the 3rd defendant - William Chang

(Digest Form Only)

Also found at [1982] CLJ 122

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